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July 6, 2004

HHS-SAMHSA
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Subject: Comment upon HHS-SAMHSA, FR Doc 04-7984, Proposed revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs, Additional specimen types.

The Drug Free Workplace Act of 1986 was put in place under President Regan with the intent of reducing illicit drug use in the work place. With the addition of urine drug testing, the Drug Free Workplace Act has proved to be a success in reducing the incidence of illicit drug use in the workplace. It has recently been proposed that additional kinds of specimen (head hair, oral fluid, and sweat) be added to the program.

Additional specimen types would pose a significant change to the program. Since the program is considered to be a success in its present form, some critical questions need to be addressed prior to implementing such a significant change to an already effective program. 1. Will the changes significantly increase the effectiveness of the program (i.e. Will the changes further lower the incidence of drug use in the workplace.)? 2. How will the changes affect the cost of implementing the program? 3. Will the changes provide the same degree of Constitutional protection for federal employees?

1. Program Effectiveness

There is significant differences, among the various kinds of proposed specimens, in the length of time drugs remain in the different specimens and in how long it takes drugs to become detectable. These factors have a direct effect upon the effectiveness of a specific specimen type. Drugs remain in oral fluid for only a short time. Drugs remain in hair for a long period of time. If there is a choice of specimen type, then an employer could either intentionally or unintentionally influence a drug test result by the choice of specimen type. If choice of specimen type is left to the collector, then more specimen types creates more opportunity for the collector to collect the incorrect specimen. Due to these reasons, if the selection of specimen type is optional for the "reason for test" (pre-employment, random, etc) and not predefined, then the false negative rate would increase. Thus the program's effectiveness would be seriously diminished.

2. Program Cost

The concentration of drugs in hair and in oral fluid is much lower than in urine. As a result more sophisticated analytical techniques, equipment and personnel must be utilized in the testing processes, each resulting in a more expensive test. The extraction of drugs from hair

is a more complicated process than for other specimen types. Thus hair testing requires a longer turnaround time for test results. The longer turnaround time for test results necessitates the employer having to wait longer before a decision can be made concerning the donor's status. This converts to extra expense for the employer. The expense of regulating a program containing multiple specimen types would increase substantially over the current cost of regulating a program containing only one specimen type. All of these items would greatly increase the cost of implementing the program.

3. Constitutional Protection

There are several potential legal issues with the testing of additional specimen types. Of much significance is that there is not a consensus of agreement among forensic scientist regarding the use of additional specimens for drug testing. As a matter of fact, without going into detail, there is more disagreement and controversy amount forensic toxicologists regarding this issue than with any other current topic. The "Frye test" challenge may not be of major consequence today in Federal court. However, it is still the standard in many States for acceptability of evidence. It would not take too serious of a challenge to demonstrate that "additional specimen" testing (especially hair) does not meet the requirements of the Frye case. Also of significance is that it appears that drugs are deposited in hair at different concentrations depending upon the color and genetic type of hair. Depending upon the specimen collection and testing protocols, there may be legitimate questions as to whether a positive drug test result necessarily implies drug use.

Summary

A famous outlaw of the past was once asked why he robbed banks. His response was, that is where the money is. Likewise the reason drug testing has routinely always been done in urine is because **"that is where the drugs are"**. Drug levels in urine are typically one hundred to one thousand fold greater in concentration than in the proposed additional specimens. Some of the proposed cut-off concentrations for additional specimen testing are so low, that laboratories could not reliably test (even with the most modern equipment) on a day-to-day basis. It is even questionable if appropriate quality control testing material can be reproducibly manufactured in the proposed additional specimens at the proposed cut-off levels.

Testing of drugs in urine had been a commonly accepted practice for drugs of abuse long before the Drug Free Workplace Act was put in place. There exists a huge amount of scientific data and legal precedence pertaining to urine drug testing. There is not the volume of data and legal precedence pertaining to drug testing in additional specimens. Before additional specimens are added to the federal guidelines for drug testing, it is my opinion that more scientific data is required. It is my opinion that there needs to be more consideration to the potential effect upon the program's cost, the program's effectiveness and upon legal issues.

My perspectives on the above issues are that of a forensic toxicologist that is nearing retirement after having practiced in the field for nearly thirty years. Whatever guidelines are put in place will have little effect upon me, for by the time they are in place I will be retired and sitting under a shade tree. However, I do not want to see a currently very effective government program risk becoming less effective because it was ambitious to initiate something before it was ready.

Respectfully,

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